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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-1457

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO LOCAL 1969, et al.,
Petitioners,

vs.

REBECCA BISE, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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SUBJECT INDEX

	Page
Opinions below	2
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement of the case	3
Reasons for granting writ	12
I. The court of appeals' decision approving an award of punitive damages involves issues raised (but not resolved) in Foust, which urgently need resolution by this court	12
II. The decision below establishing a violation of Section 101(a)(2) and adopting a standard of review of union trial board decisions is in conflict with decisions of this court and with decisions of other courts of appeals	17
III. Respondents' failure to exhaust internal union appeals under LMRDA Section 101(a)(4) raises important questions of law	20
Conclusion	22

TABLE OF AUTHORITIES CITED

Cases	Page
Bise, et al. v. International Brotherhood of Electrical Workers, AFL-CIO, Local 1969, ... F.2d .... (Sept. 24, 1979)	1
Booster Lodge No. 405, Int'l Ass'n. of Machinists v. NLRB, 412 U.S. 84 (1973)	10, 16, 17
Buzzard v. Local Lodge 1040, 480 F.2d 35 (9th Cir. 1973)	21
Cooke v. Orange Belt Dist. Council, 529 F.2d 815 (9th Cir. 1976)	15
Detroy v. American Guild of Variety Artists, 286 F.2d 75 (2d Cir. 1961)	22
Harris v. International Longshoremen's Assn. Local 129, 321 F.2d 801 (3d Cir. 1963)	20
IBEW v. Foust, ... U.S. ...., 99 S.Ct. 2121, 60 L.Ed.2d 698 (1979)	12, 13, 16, 17
International Brotherhood of Boilermakers v. Braswell, 388 F.2d 193 (5th Cir. 1968), cert. denied, 391 U.S. 935	15, 16
International Brotherhood of Boilermakers v. Hardeman, 401 U.S. 233 (1971)	18, 19
Local 20, Teamsters Union v. Morton, 377 U.S. 252 (1964)	12, 13, 14, 16
Local 60, Carpenters v. NLRB, 365 U.S. 651 (1961)	12
McCraw v. United Ass'n. of Journeymen and App. Plumbing, 341 F.2d 705 (6th Cir. 1965)	15
Morrissey v. National Maritime Union, 544 F.2d 19 (2d Cir. 1976)	15
Murphy v. Operating Engineers, Local 18, ... F.Supp. ...., 99 LRRM 2041, 2131 (N.D. Ohio 1978)	15
National Woodwork Manufacturers Association v. NLRB, 386 U.S. 612 (1967)	14
Nix v. Fulton Lodge No. 2, International Ass'n. of Machinists, 262 F.Supp. 1000 mod. 415 F.2d 212 (5th Cir. 1969) cert. denied, 406 U.S. 946 (1972)	15
NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175 (1967)	16, 19
NLRB v. Granite State Joint Board, Textile Workers Union, 409 U.S. 213 (1972)	10, 16, 17
NLRB v. Local 294, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 470 F.2d 57 (2d Cir. 1972)	18, 19

Table of Authorities Cited

Cases — Page

Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1940) 12, 16

Republic Steel Corp. v. NLRB, 311 U.S. 7 (1940) 12, 16

Reyes v. Laborers Union, Local 16, 464 F.2d 595 (10th Cir. 1972) 19

Schwegmann Brothers v. Calvert Distillers Corp., 341 U.S. 384 (1951) 14

Simmons v. Avisco, Local 713 Textile Workers Union of America, 350 F.2d 1012 (4th Cir. 1965) 15

Wigglesworth v. Teamsters, Local 592, 552 F.2d 1027 (4th Cir. 1976) 21

Statutes

28 U.S.C. Section 1254(1) 2

Labor Management Reporting and Disclosure Act (29 U.S.C.):
- Sections 401, et seq. ..... passim
- Section 411 20
- Section 411(a)(2) 3, 9, 10, 17, 19
- Section 411(a)(4) 3, 20
- Section 411(a)(5) 3, 9
- Section 411(b) 3
- Section 412 ..... 3, 11
- Section 529 ..... 3, 17
- Section 530 3

Landrum-Griffin Act 13

National Labor Relations Act (29 U.S.C.):
- Section 157 3
- Section 158 8
- Section 158(b)(1) 3, 10
- Section 158(b)(1)(A) 18
- Section 158(b)(2) 3, 10

Taft-Hartley Act 14

Other Authorities

House Report No. 741 on House Resolution 8342 14

International Union Constitution, Article XXVI 4

Legislative History of the LMRDA of 1959, Vol. I, pp. 857-858 14

Legislative History of the LMRDA of 1959, Vol. II, p. 1414, col. 3 ..... 14, 15

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

International Brotherhood of Electrical Workers, AFL-CIO, Local 1969, Dick Cripe and Elsie M. Smith hereby petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit, enabling this Court to review the opinion and judgment in Bise, et al. v. International Brotherhood of Electrical Workers, AFL-CIO, Local 1969, ... F.2d ..... (Sept. 24, 1979).

OPINIONS BELOW

The Opinion of the Court of Appeals appears in the Appendix hereto as Appendix A-1. The Court of Appeal's Order denying the Petition for Rehearing and Suggestion for Rehearing En Banc appears in the Appendix hereto as Appendix B-1. The Judgment of the United States District Court for the Northern District of California, filed on February 7, 1977 (Appendix C-1, *infra*), the Order Pendente Lite, dated February 11, 1975 (Appendix D-1, *infra*), the January 9, 1976, Order of the District Court granting in part and denying in part petitioners' and respondents' motions for summary judgment (Appendix E-1, *infra*), the March 12, 1976, Order granting in part petitioners' motion for partial summary judgment (Appendix F-1, *infra*), the June 23, 1976, Order denying petitioners' motion for judgment notwithstanding the verdict, or in the alternative, for a new trial (Appendix G-1, *infra*), and the Opinion of the District Court regarding respondents' request for attorneys' fees, filed February 7, 1977 (Appendix H-1, *infra*), are all unreported.

JURISDICTION

The Judgment of the Court of Appeals was entered on September 24, 1979. A timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied on December 19, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. May punitive damages be awarded to union members under the Labor Management Reporting and Disclosure

Act where (a) the union trial board has found the members guilty of engaging in strikebreaking activities; or (b) the union has engaged in no egregious or violent conduct?

2. May a District Court conclude that a union trial board has improperly imposed fines against union members in violation of the LMRDA where substantial evidence was presented to the union trial board that the members had engaged in unprotected strikebreaking activities?

3. Under what circumstances does a District Court abuse its discretion in failing to require union members to exhaust internal appeal procedures provided by a union constitution?

4. Are compensatory and punitive damages allowable to union members under the LMRDA where there is no evidence of consequential damage?

STATUTES INVOLVED

This case involves the Labor Management Reporting and Disclosure Act, 29 U.S.C. §§ 401, *et sequitur*. Particularly pertinent are 29 U.S.C. § 411(a)(2), § 411(a)(4), § 411(a)(5) and § 411(b); 29 U.S.C. § 412; 29 U.S.C. § 529; and 29 U.S.C. § 530. Also pertinent are sections 7, 8(b)(1) and 8(b)(2) of the National Labor Relations Act, as amended, 29 U.S.C. §§ 157, 158(b)(1) and 158(b)(2), respectively. These statutory provisions are all attached as Appendix I, *infra*.

STATEMENT OF THE CASE

This action was brought on January 8, 1975, by nine members of petitioner Local 1969, seeking injunctive relief and damages against Local 1969 and two business represen-

tatives for alleged wrongful discipline imposed by a Local 1969 trial board following an economic strike at Precision Plastics, Inc., employer of all the respondents.

Nearly all of the Precision Plastics employees (RT 158) were in attendance on July 14, 1974, when the union's negotiators presented the company's final proposal to the employees. The proposal was overwhelmingly rejected, and by secret ballot the employees voted to strike (RT 157-158)[1]

The strike, sanctioned in accordance with the union's constitution, began on July 15. All of the respondents except respondent Claude Stones initially participated. Some of the respondents engaged in picketing. Employees were provided pay for picket duty and strike benefits, and the union attempted to provide additional financial aid to employees who requested assistance (RT 291-294, 374, 386, 677-678, 728-729, 733, 755, 784-785).

Respondent Claude Stones crossed the picket line daily and continued to work throughout the strike.[2] Petitioner Elsie Smith filed charges against Stones on July 30 while

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[1]RT references herein refer to the Reporter's Transcript, part of the record on file with the Court of Appeals.

[2]Claude Stones never resigned from the union but instead applied for a "withdrawal card" (RT 176, 193, 200). Article XXVI of the International Union Constitution provides: "A member on a withdrawal card may be subject to charges, trial and appropriate penalty in accordance with the provisions of this Constitution." (Pet. Exh. No. 1000, p. 97). The District Court properly instructed the jury that a member who holds a withdrawal card is subject to union discipline (RT 886).

In addition to crossing the picket line, Stones also met secretly with the company president and circulated reports among union members that the company would never agree to a union contract proposal for a grievance arbitration clause (RT 190, 653-659).

the picketing continued. During the course of the strike, union negotiators received reports from striking employees that some other members were planning to cross the picket line, and that they had been asking other members to join them. Similar reports were received from company representatives during negotiations (RT 474-475, 722-725). On July 26, the union sent a news bulletin to all striking employees, including respondents, warning that any members who engaged in strikebreaking activities would be charged and tried for violating provisions of the union's constitution (Pet. Exh. No. 1,019).[3]

On July 31, the union held another membership meeting attended by respondents Bise, Bradley, Carr, Kaona, Klatt, Ornellas, Pappas and Maxine Stones, to discuss the progress of the strike. None of the respondents spoke in favor of terminating the strike, or in favor of any other alternative solution (RT 274-285, 325, 730, 850, 859). At the conclusion of the meeting another secret ballot strike vote was taken and the members voted to continue the strike by more than two-thirds majority vote (RT 730, Appendix J) During the meeting all members were advised of the provisions of the International Union Constitution governing union member conduct during a strike (RT 468, 481-483, 511).

Immediately following the July 31 meeting, four of the respondents (Klatt, Bise, Ornellas and Kaona) crossed the picket line, entered the plant and spoke to the company general manager, who was waiting at the

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[3]References to Respondents' Exhibits (Resp. Exh.) and Petitioners' Exhibits (Pet. Exh.) are exhibits filed with the District Court, which are part of the record before the Court of Appeals.

door.[4] Thereafter, all four prepared resignation letters which were received by the union on August 5 (RT 306, 336, 340, 350).[5]

Respondent Dan Carr's letter of resignation to the union, dated August 6, was received August 7. Carr's pre-resignation conduct included a visit with the company president in Carr's home, at which time arrangements were made by Carr with the company president for two of Carr's friends, who were not union members, to work during the strike (RT 390, 395, 402, 409).[6]

Respondent Victoria Pappas negotiated her return to work with the company president on August 9 (RT 681). She was referred to respondent Klatt, who had already returned to work. Klatt prepared a resignation letter for Pappas which was received by the union on August 12 (RT 682). Although there was no evidence that respondents Stella Bradley and Maxine Stones crossed the picket line before they resigned, both dealt with the employer before they submitted their resignation letters to the union (RT 424-426, 681, 701-702).[7]

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[4]Some of the respondents claimed they had permission to cross the picket line on July 31 and pick up vacation checks. No such permission was given by the union or by the picketeers on duty (RT 256, 765-768). Later, at trial, three of the four respondents admitted they had received their vacation checks before they entered the plant on July 31 (RT 254-257).

[5]Additional evidence of pre-resignation conduct by these four respondents is contained in Appendix J, and in the record below at RT 254-255, 260, 302-306, 351-353, 378, 722-727, 764, 807.

[6]Additional pre-resignation conduct of Carr is found in Appendix J and at RT 390, 395, 402-405, 745-746, 761-762.

[7]Respondent Maxine Stones was charged with having knowledge of and failing to report violations known to her of a strikebreaking plan (RT 136; Appendix J). Respondent Bradley was charged with having knowledge of and failing to report the strikebreaking plan, and with working with company officials (RT 412, 419).

Individual charges were filed against respondent Claude Stones by petitioner Smith on July 30, and a union trial board hearing was held on August 29. Stones was properly notified but did not appear. The trial board convicted Stones of improperly crossing the picket line during the strike and fined him $1,500, of which $250 was suspended. (Appendix J).

In the meantime, the strike was settled and the contract ratified on August 16. The remaining respondents were directed to rejoin the union immediately and did rejoin. Charges against these eight respondents were filed by Petitioner Cripe on September 5, after they rejoined the union.[8]

The September 5 charges alleged various violations of the union constitution, including the unauthorized crossing of picket lines prior to their resignation from the union, working in concert with the struck employer, engaging in activity to undermine the effectiveness of Local 1969 as the collective bargaining representative of Precision Plastics employees, reporting union business to the employer and soliciting strikebreakers on behalf of the employer (Appendix A, Appendix J).

Each of these respondents was then tried before a trial board, consisting of union members who were not members of the unit employed at Precision Plastics (RT 772-775, 787-893; Appendix A, fn. 10). Following hearings on October 9, the trial board found respondents Pappas, Klatt, Bise and Maxine Stones guilty of the charges lodged against them. Maxine Stones was found not guilty of mak-

[8]Charges against these eight respondents that had been filed by petitioner Smith after they had resigned, but before they had rejoined the union, were dropped on advice of counsel.

ing known to others the business of the local union (Appendix J).

Respondents Ornellas, Kaona and Carr were found guilty of the charges lodged against them following the trial board hearings on October 10. Ornellas and Carr did not attend their trial board hearings. Respondent Bradley was found guilty of the charges lodged against her on November 7, 1974 (Appendix J). Bradley also did not attend her hearing.

An unfair labor practice charge against the union was filed under Section 8 of the National Labor Relations Act by respondent Carr on October 18. On November 19, 1974, the NLRB Regional Director notified Carr that he was refusing to issue a complaint.[9] That determination was never appealed. The union trial board decisions were also not appealed.[10]

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[9]The charge was investigated by Region 20 of the National Labor Relations Board. In a letter to respondent Carr, Regional Director Roy O. Hoffman explained:

> The above-captioned case charging a violation under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.
>
> The investigation disclosed that the fines levied against the employees by the Charged Union were based upon conduct engaged in by those employees while they were members of the Charged Union. In these circumstances, the Charged Union's conduct is covered by the proviso to Section 8(b)(1)(A) of the Act, which has been held to permit unions to fine members and therefore does not constitute a violation of the Act. I am, therefore, refusing to issue complaint in this matter. (Pet. Exh. No. 1,015)

[10]The appeal procedure was set forth in writing in Decisions mailed to each respondent (Pet. Exhs. Nos. 1005E-1013E). It provided for an Appeal to the International Vice President within forty-five days, following the Decision of the Trial Board (Pet. Exh. No. 1,000).

In their United States District Court complaint, respondents alleged, *inter alia,* that they were disciplined by their union for engaging in protected rights of free speech and assembly, in violation of the LMRDA, 29 U.S.C. § 411(a)(2), that said charges were filed and fines imposed, in violation of the due process requirements of 29 U.S.C. § 411(a)(5), and that petitioners intentionally inflicted mental distress upon respondents.

Prior to the trial the District Court determined that there were no procedural or due process violations and dismissed the Section 411(a)(5) allegations (Appendix E). The Section 411(a)(2) allegations and the related State cause of action for intentional infliction of emotional distress were then heard before a jury.

The District Court determined that the evidence should be limited to an examination of petitioners' conduct relating to the filing of the charges rather than an examination of the conduct of respondents for which disciplinary fines were actually imposed.[11] Respondents argued below that petitioners Cripe and Smith did not investigate their charges before they were filed and presented to the trial board and that

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[11]The trial court instructed the jury that the testimony of John Knezevich, president of the trial board, was hearsay, regarding the reasons for the discipline imposed by the trial board (RT 797, ln. 11-RT 798, ln. 1). The trial court further admonished Knezevich that it wanted him to testify only in general, summary fashion, and did not want him to explain the specific conduct or reasons for which discipline was imposed upon each of the individual respondents (RT 804, lns. 11-17). The trial court also excluded the official trial board hearing minutes (Appendix J) as hearsay (RT 226-236) and restricted direct testimony from the witnesses who testified before the trial board, including petitioner Cripe, on the grounds that said testimony was cumulative to the hearsay testimony of Knezevich (RT 861-862).

respondents were disciplined for resigning from the union (Resp. Brief below, pp. 13-17).

The jury returned a verdict in favor of petitioners dismissing all the allegations of intentional infliction of emotional distress, but rendered a general verdict in favor of respondents. The jury awarded all respondents various compensatory damages in the total amount of $4,851[12] and total punitive damages in the amount of $80,000. On remittitur, the court entered judgment against petitioners for compensatory damages in the amount of $4,851, punitive damages in the amount of $20,000, added attorneys' fees in the amount of $20,000, and issued a permanent injunction prohibiting petitioner Local 1969 from enforcing the union fines against all the respondents.

Relying upon *NLRB v. Granite State Joint Board, Textile Workers Union,* 409 U.S. 213 (1972) and *Booster Lodge No. 405, Int'l Ass'n of Machinists v. NLRB,* 412 U.S. 84 (1973), both of which concerned violations of Sections 8(b)(1) and 8(b)(2) of the National Labor Relations Act, 29 U.S.C. § 158, the Court of Appeals affirmed the judgment entered by the trial court, holding that petitioner Local 1969 had wrongfully fined respondents in violation of their protected rights of free speech and association under Section 101 of the LMRDA, 29 U.S.C. § 411(a)(2). The Court of Appeals declined to state what evidence, if any, was

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[12]Except for respondent Claude Stones, who received one dollar, the compensatory damages awarded by the jury to the eight other respondents equaled the amounts that the union trial board had imposed as fines against each respondent. These fines had never been collected by the petitioner. An Order Pendente Lite (Appendix D) had been issued restraining any attempted enforcement shortly after respondents filed this action. The jury was not aware of this order.

sufficient to justify the jury's finding of a violation of respondents' right of free speech and assembly under the LMRDA.[13]

The Court of Appeals upheld all the punitive damages awarded by the District Court but vacated the compensatory damages of five respondents, holding that an award of compensatory damages for being angry, nervous, upset or depressed, without proof of any actual injury, was not recoverable under the remedial provisions of Section 102 of the LMRDA, 29 U.S.C. § 412. The compensatory damages of respondents Bise, Pappas, Maxine Stones and Kaona were affirmed, the court holding that "there was sufficient evidence of causal connection between the union's conduct and the actual injuries allegedly sustained by each of the[se] plaintiffs to present a jury question." (Court of Appeals' Opinion, Appendix A.)

The evidence to which the Court referred was as follows: respondent Bise allegedly became so upset when she was handed a copy of the charges against her that she broke a die and was thereafter disciplined by her employer.[14] Respondent Pappas was allegedly damaged when she became so angered when she was handed a copy of the charges that she waited five minutes to open them. Pappas allegedly then missed work because of headaches and heart palpitations she experienced after being handed the charges.[15]

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[13]The Court of Appeals stated "The facts relating to each of the charges have been exhaustively discussed in the briefs. We do not repeat them here." (Court of Appeals' Opinion, Appendix A).

[14]Respondents' Responsive Brief, p. 33.

[15]Respondents' Responsive Brief, p. 35.

Respondent Maxine Stones allegedly was damaged because she became jumpy, nervous and started shaking when petitioner Cripe handed her the charges. She said she became nervous and upset whenever she thought about the fine that was later imposed on her.[16] Respondent Frances Kaona also allegedly became nervous and upset, and "because of high blood pressure" she allegedly ate more and gained weight.[17] No doctor was called to support any of respondents' claims.

REASONS FOR GRANTING WRIT

I. THE COURT OF APPEALS' DECISION APPROVING AN AWARD OF PUNITIVE DAMAGES INVOLVES ISSUES RAISED (BUT NOT RESOLVED) IN FOUST, WHICH URGENTLY NEED RESOLUTION BY THIS COURT.

This Court has on a number of occasions determined that punitive damages are not recoverable under remedial provisions of federal labor law. *IBEW v. Foust,* ..... U.S. ....., 99 S.Ct. 2121, 60 L.Ed.2d 698 (1979); *Local 20, Teamsters Union v. Morton,* 377 U.S. 252 (1964); *Republic Steel Corp. v. NLRB,* 311 U.S. 7 (1940); *Local 60, Carpenters v. NLRB,* 365 U.S. 651, 655 (1961); *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 185 (1940). In holding punitive damages to be inappropriate in *Foust,* this Court declared that the fundamental purpose of fair representation suits is to compensate for injuries caused by violations of employee rights (*id.* at 99 S.Ct. 2126).

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[16]Respondents' Responsive Brief, p. 35.

[17]Respondents' Responsive Brief, p. 34.

Speaking for the Court, Justice Marshall declared that general labor policy disfavors punishment. Because the adverse consequences of punitive damage awards could be substantial, inflicting the risk on employees whose welfare depends upon the strength of their union was too great a risk for whatever deterrent effect punitive damages may have. Justice Marshall further declared:

> Absent clear congressional guidance, we decline to inject such an element of uncertainty into union decisions regarding their representative functions.
> *IBEW v. Foust* at 99 S.Ct. 2128.

As this Court pointed out in *Foust,* it has not as yet addressed itself to the application and interpretation of LMRDA with respect to the punitive damage issue.[18] Justice Blackmun in discussing *Morton* in his concurring opinion in *Foust* noted that there is a distinction to be drawn between the judicially established principle of remedy for failure to fairly represent and a statutorily established remedy as is the case under the Landrum-Griffin Act. In the latter instance the intent of Congress becomes important.[19]

In view of these comments by this Court in *Foust,* it is appropriate that the legislative history of the LMRDA be considered. In opposing the original draft of the Landrum-Griffin bill, Senator Wayne Morse feared that one day the very situation presented in this case could result. Senator Morse declared:

> .... Under these provisions, union officers can be sued by a union member who has been ejected from a meet-

[18] *Foust,* 99 S.Ct. 2121, 2125, fn. 9.
[19] *Foust,* 99 S.Ct. 2121, 2130.

> ing or who has been disciplined for leading a back-to-work movement in the midst of a strike if this officer's action does not appear to be reasonable in the circumstances to the court . . . .
>
> Legislative History of the LMRDA of 1959, Vol. II, p. 1414, col. 3.

In reply, Senator Morse's colleagues, the sponsors of the LMRDA, repeatedly stated that such a result was *not* intended and that punitive damages should not be recoverable.[20]

The Honorable Phil M. Landrum and Robert P. Griffin, at the time they introduced their substitute bill, later to become the LMRDA, declared in House Report No. 741 on House Resolution 8342: "The substitute bill is moderate but effective. It is not punitive or extreme." (Legislative History of the LMRDA of 1959, Vol. I, pp. 857-858.) Griffin and Landrum went on to say, "The substitute [in Sections 609 and 610] restores the sense of the Senate passed provision but makes it clear that criminal sanctions apply only when rights are denied through the use of force or violence (*id.*)."

Senator Karl Mundt, the vice chairman of the McClellan Committee, during the debate on the Joint House-Senate Conference Report on the LMRDA, as enacted, declared:

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[20]See *National Woodwork Manufacturers Association v. NLRB*, 386 U.S. 612 (1967); *Schwegmann Brothers v. Calvert Distillers Corp.*, 341 U.S. 384 (1951) (statements by sponsors regarding legislative intent to be given primary attention).

In *Morton*, this Court reviewed a similar dialogue between Senator Morse and Senator Robert Taft in determining the propriety of punitive damages under the Taft-Hartley Act (*id.* at p. 261, fn. 16).

"I think it should also be made perfectly clear, Mr. President, that this is not punitive legislation." (Legislative History, *supra*, at Vol. II, p. 1448.)[21]

The Courts of Appeals have divided on the propriety of punitive damages under the LMRDA.[22] All of the Courts of Appeals' decisions that have previously upheld punitive damages under the LMRDA have involved factual settings

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[21]See also statements of Representative James O'Hara of Michigan on comparing the Landrum-Griffin Bill to the Elliott Bill it replaced:

> "These rights are enforced effectively and fairly by civil actions in the Federal courts. In such suit the court can award money damages to compensate any loss suffered by a member through denial of any of the enumerated rights and can enjoin any repetition of actions which deprive the member of his rights."
>
> Leg. History, *supra*, Vol. II. p. 1632.

Representative Carl Elliott also testified to the remedial intent of a predecessor section:

> "Thus a suit to prevent and restrain a violation of the so-called bill of rights might terminate in an injunction, but also in an *order setting* aside discipline imposed by a labor organization, and *restoring* the plaintiff to membership if appropriate, and *awarding monetary damages if suffered.* Leg. History, supra, Vol. II, p. 1584 (emphasis supplied).

[22]Cf. the Fifth Circuit's decision in *International Brotherhood of Boilermakers v. Braswell*, 388 F.2d 193 (5th Cir. 1968), *cert. denied*, 391 U.S. 935, the Second Circuit's decision in *Morrissey v. National Maritime Union*, 544 F.2d 19 (2d Cir. 1976), the Ninth Circuit's decision in *Cooke v. Orange Belt Dist. Council*, 529 F.2d 815 (9th Cir. 1976), the Fourth Circuit's decision in *Simmons v. Avisco, Local 713 Textile Workers Union of America*, 350 F.2d 1012 (4th Cir. 1965), the Fifth Circuit's decision in *Nix v. Fulton Lodge No. 2, International Ass'n. of Machinists*, 262 F.Supp. 1000, modified 415 F.2d 212 (5th Cir. 1969) cert. denied, 406 U.S. 946 (1972) and the Sixth Circuit's decision in *McCraw v. United Ass'n. of Journeymen and App. Plumbing*, 341 F.2d 705 (6th Cir. 1965).

In 1978, the United States District Court for the Northern District of Ohio discussed the split in the Circuits and denied punitive damages under the LMRDA, holding that it was bound by the Sixth Circuit's *McCraw* decision. *Murphy v. Operating Engineers, Local 18*, ... F.Supp. ...., 99 LRRM 2041, 2131 (N.D. Ohio 1978).

relating to members' participation in the internal affairs of a union. None have involved union members' conduct which opposed the collective decisions of all bargaining unit employees during an economic dispute with an employer. See *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967).[23]

An improper union fine against a member for resigning and returning to work may subject a union to remedial relief under *Granite State, Joint Board* and *Booster Lodge No. 405*, but does not subject it to punitive damages, *Phelps Dodge, supra*; *Republic Steel Corp., supra.* No reason suggests itself why punitive damages unavailable under the NLRA should be awarded under the LMRDA for identical proscribed conduct if a careful balance between individual and collective interests is to be maintained.

The Court of Appeals' decision below, upholding an award of punitive damages in an LMRDA case, not only is inconsistent with legislative history and with the principles enunciated by Justice Marshall in *Foust,* it is also in conflict with the *Foust* concurring opinion of Justice Blackmun. Respondents argued to the Court below that a punitive damage award was justified because Local 1969 had disciplined respondents for resigning and returning to work during a strike (Resp. Brief on Appeal, pp. 8, 9, 11-16). Respondents also argued that Petitioners Cripe and Smith failed to investigate before submitting the charges

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[23] *Braswell,* cited in all the recent decisions, did not discuss the congressional debate discussed herein but relied on state court decisions that had upheld punitive damages under New York State law (*id.* at 199). The *Braswell* court believed that nothing in the legislative history touches on the question (*id.* at 200).

to the union trial board (*id.* at 37).[24] Even if true, this conduct was not egregious, outrageous or exceptional (see, e.g., Blackmun's concurring opinion in *Foust* at 2132). Nor was there any violent conduct which would invoke the specific penal provisions of Section 609 of the LMRDA, 29 U.S.C. § 529.

In light of the foregoing, the determination of whether punitive damages may be allowed under the LMRDA and under the facts of this case is an important and far-reaching question of law.

II. THE DECISION BELOW ESTABLISHING A VIOLATION OF SECTION 101(a)(2) AND ADOPTING A STANDARD OF REVIEW OF UNION TRIAL BOARD DECISIONS IS IN CONFLICT WITH DECISIONS OF THIS COURT AND WITH DECISIONS OF OTHER COURTS OF APPEALS.

Relying upon *Granite State Joint Board* and *Booster Lodge*, the Court below affirmed the judgment entered by the trial court that petitioner Local 1969 wrongfully fined respondents in violation of their protected rights of free speech and association under Section 101(a)(2) of the LMRDA, 29 U.S.C. § 411(a)(2):

> There is substantial evidence in the record that in fact it was the plaintiffs' post-resignation return to work that prompted the fines. Moreover, the charges included pre-resignation conduct that was clearly within the protection of the LMRDA. We therefore find that the

[24] As discussed in Section II, *infra*, there was no evidence that the union trial board engaged in any conduct proscribed by the LMRDA. There was substantial evidence presented to the union trial board that respondents participated in unprotected conduct prior to submitting their resignations to the union.

> jury could reasonably arrive at the conclusion that it was the Union's purpose to punish the plaintiffs for resigning and returning to work.
>
> (Appendix A, p. 5.)

This Court held in *International Brotherhood of Boilermakers v. Hardeman,* 401 U.S. 233 (1971), that when union members are charged and fined for engaging in activities allegedly protected by the LMRDA, the responsibility of the court is to determine whether there was *some* evidence of misconduct presented to the union trial board. The Court of Appeals' decision below, which relies in part on the Second Circuit's opinion in *NLRB v. Teamsters, Local 294*[25] appears to alter the *Hardeman* standard of review. This court had said in *Hardeman:*

> III. There remains only the question whether the evidence in the union disciplinary proceeding was sufficient to support the finding of guilt. Section 101(a)(5)(C) of the LMRDA guarantees union members a "full and fair" disciplinary hearing, and the parties and the lower federal courts are in full agreement that this guarantee requires the charging party to provide some evidence at the disciplinary hearing to support the charges made [footnote omitted].
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>
> Senator Kuchel, who first introduced the provision, characterized it on the Senate floor as requiring the "usual reasonable constitutional basis" for disciplinary action, 105 Cong. Rec. 6720 (1959), and any lesser

[25] *NLRB v. Local 294, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,* 470 F.2d 57 (2d Cir. 1972) involved a review by the Circuit Court of Appeals of a decision of the National Labor Relations Board finding a violation of Section 8(b)(1)(A) of the National Labor Relations Act.

> standard would make useless § 101(a)(5)(A)'s requirement of written, specific charges. A stricter standard, on the other hand, would be inconsistent with the apparent congressional intent to allow unions to govern their own affairs, and would require courts to judge the credibility of witnesses on the basis of what would at best be a cold record [footnote omitted].
>
> *Boilermakers v. Hardeman*, 401 U.S. 246-247.

The standard of review applied by the Court of Appeals below is also in conflict with the standard of review applied in *Reyes v. Laborers Union, Local 16*, 464 F.2d 595 (10th Cir. 1972). *Reyes* holds that the trial court must uphold the union's findings if it is supported by *any* evidence produced at the disciplinary trial board which made a fair and impartial determination of guilt.

The holding of the Court below effectively undermines union trial board proceedings by allowing members who have been disciplined[26] thereafter to challenge the action through a trial *de novo* in the District Court simply by alleging a violation of LMRDA Section 101(a)(2) "freedom of speech" rights. A distinction drawn between alleged Section 101(a)(2) and 101(a)(5) violations[27] would appear to be contrary to the holding and reasoning of this Court in *Hardeman* when the issue before the Court relates to whether or not a union trial board has improperly imposed discipline against a union member.

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[26]This Court has consistently declared that the federal labor policy favors the power of a chosen union to protect against erosion of its status by imposing reasonable discipline. *Allis-Chalmers, supra*, 388 U.S. 175, 181.

[27]See *Teamsters Local 294, supra.*

Finally, important questions of law are presented which require resolution by this Court concerning whether or not discipline for "resigning and returning to work" constitutes an actionable violation under the LMRDA, and whether or not the various personal complaints testified to by respondents at trial and which were unrelated to action of the union trial board justified any compensatory damage award under the LMRDA.

III. RESPONDENTS' FAILURE TO EXHAUST INTERNAL UNION APPEALS UNDER LMRDA SECTION 101(a)(4) RAISES IMPORTANT QUESTIONS OF LAW.

While exhaustion of internal union remedies lies within the sound discretion of the trial court, petitioners respectfully submit that the trial court abused that discretion in this case by excusing respondents from exhausting their internal union remedies. In addition, the Court of Appeals failed to provide criteria against which a reasonable review of the trial court's discretion could occur.[28]

The determination of the trial court that it should immediately assert its jurisdiction without regard to the exhaustion of remedies requirement (RT 7, lns. 8-20; RT 16, lns. 7-14) where Section 101 allegations have been made is not supportable unless actual interference with those rights is imminent. *Harris v. International Longshoremen's Assn. Local 129,* 321 F.2d 801 (3d Cir. 1963)

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[28]The Court of Appeals declared:

> Therefore, when, as here, the plaintiffs have raised issues that are in the public domain and beyond the internal affairs of the union, the union's internal procedures may be inadequate. [footnote omitted]
>
> (Appendix A, p. 4.)

and *Wigglesworth v. Teamsters, Local 592,* 552 F.2d 1027 (4th Cir. 1976). In these proceedings, no fines were collected or paid. Respondents were under no threat of removal from union membership, and the union was not interfering with the right of the respondents to actively participate or speak in regard to the internal affairs of the union (RT 130, 157-158, 160, 595, 858-860). *Buzzard v. Local Lodge 1040,* 480 F.2d 39 (9th Cir. 1973).

Respondents complained to the Court below that exhaustion should not be required because the union had sent letters threatening respondents with legal action if they did not pay the fines.[29] The evidence shows that letters were sent to the respondents following dismissal by the Regional Director of a charge against the union (p. 8, *supra*). The union thereafter did file one lawsuit to collect the fine imposed against Claude Stones.

The letters, however, were all sent *after* the respondents had refused to pursue their appellate remedies even though each respondent had been advised in writing concerning these remedies (*cf.* Pet. Exhs. No. 1,005-E to 1,013-E with Pet. Exhs. No. 1,005-F to 1,013-F).[30] Moreover, the letters and the lawsuit against respondent Claude Stones did not interfere with the respondents' freedom of speech or with their right to participate in the internal affairs of the union.

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[29]Respondents' Brief below, pp. 27-31.

[30]The attorney for the respondents contacted the attorney for the petitioners and requested an extension of time to file an appeal. He was specifically directed to request an extension of time from the union's International Vice President (RT 14, lns. 6-23), as provided in the union's constitution. No request for an extension was thereafter submitted to the International Vice President.

In *Detroy v. American Guild of Variety Artists,* 286 F.2d 75 (2d Cir. 1961), the Second Circuit emphasized that courts should not step in until unions are given the opportunity to take corrective action. *Id.* at 79. The circumstances of the instant case strongly suggest the need for clear guidelines that govern a trial court's intervention prior to a union member's exhaustion of remedies available under a union constitution.

CONCLUSION

It is respectfully submitted that the failure of the Court below to apply principles of law established by the decisions of this Court and by other Circuit Courts of Appeal requires that the Court grant certiorari. If allowed to stand, the decision of the Court of Appeal below will impair substantially the decisions of this Court and of the Circuit Courts, and cause an erosion of fundamental principles enacted by Congress into federal labor law.

For all the reasons stated in this petition, a writ of certiorari should be issued to review the judgment and opinion of the Court below.

Respectfully submitted,

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